BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RORY ROBY, Claimant, v. CHESTER BARNETT, Employer, and ASSOCIATED LOGGERS EXCHANGE, Surety, Defendants.	)	**IC 2002-011476** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed December 24, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Lewiston on January 26, 2007. Claimant, Rory Roby, was present in person and represented by Christopher Caldwell of Lewiston. Defendant Employer, Chester Barnett (Barnett), and Defendant Surety, Associated Loggers Exchange, were represented by Alan K. Hull, of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on July 25, 2007.

ISSUES

The issues to be resolved are:

1. Whether Claimant's cervical condition was caused by his industrial accident,

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition,

3. Claimant's entitlement to medical care after October 23, 2002, including cervical surgery,

4. Claimant's entitlement to temporary partial and/or temporary total disability benefits,

5. Claimant's entitlement to permanent partial impairment benefits,

6. Claimant's entitlement to permanent disability in excess of impairment,

7. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate, and

8. Claimant's entitlement to attorney fees.

ARGUMENTS OF THE PARTIES

Claimant maintains that his need for cervical fusion surgery was caused by his industrial accident of July 2, 2002. He asserts entitlement to medical benefits after October 23, 2002, permanent impairment of 25% of the whole person, with 20% impairment attributable to his industrial accident and 5% to pre-existing conditions, total temporary disability benefits from the date of his cervical surgery until May 2006, and attorney fees for Defendants' unreasonable failure to investigate his claim.

Defendants acknowledge Claimant's 2002 industrial accident but assert that Claimant recovered by October 2002, and that all subsequent medical treatment, including his cervical fusion, was caused by other events. Defendants assert Claimant is not entitled to any further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, his spouse Julie Ann Roby, and Todd Winslow taken at hearing;
2. Claimant's Exhibits 1 through 38 admitted at hearing;
3. Defendants' Exhibits 1 through 34 admitted at hearing;
4. Deposition of Dennis Harper, D.C., taken by Defendants on October 19, 2006, and February 21, 2007;
5. Deposition of Bret A. Dirks, M.D., taken by Defendants on December 29, 2006, January 30, 2007, and February 22, 2007;
6. Deposition of John M. McNulty, M.D., taken by Defendants on February 22, 2007; and
7. Deposition of Douglas Crum, CDMS, taken by Defendants on February 27, 2007.

All objections made during Dr. Harper's deposition are overruled. All objections made during Dr. Dirks' deposition are overruled, except Defendants' objection at page 95 thereof which is sustained. All objections made during Dr. McNulty's deposition are overruled, except Claimant's objections at pages 47-48, and 81, which are sustained.

Defendants filed a Motion to Strike Claimant's Reply Brief on the grounds that it contains numerous uncivil and unfounded personal attacks against Defendants' counsel and Dr. Harper. The Reply Brief was not authored by Mr. Caldwell. Claimant responded with a Motion to Strike Defendants' motion. The Referee finds a number of comments in Claimant's Reply Brief inappropriate and unwarranted and grants Defendants' Motion to Strike.

After having considered the evidence, and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Claimant was born in 1958. He was 49 years old at the time of the hearing and resided in Orofino at all relevant times. Claimant graduated from high school in Orofino. He has received no other formal educational training. He excelled in high school athletics. Claimant also raced motorcycles commencing in his late teens. He suffered bruised kidneys in one motorcycle accident for which he received medical treatment and recovered.

2. After graduating from high school in 1976, Claimant commenced working as a sawyer in Orofino. He worked briefly for several logging companies before beginning work for Barnett prior to 1980. Claimant worked principally for Barnett for approximately 18 years as a sawyer. Thereafter, he became a forwarder operator. He continued to saw occasionally.

3. Claimant experienced occasional neck symptoms and sought chiropractic treatment from Dennis Harper, D.C., for neck pains commencing no later than 1985. Claimant's neck symptoms did not stop him from working.

4. On July 31, 1989, Claimant's neck was injured when a falling snag hit the top of his hard hat and made him "see stars." He received conservative treatment from Peter Crecelius, M.D., and returned to work. Claimant told Dr. Crecelius he had been advised that he had the neck of a 50 year old.

5. Commencing in approximately 1990, Claimant developed a variety of symptoms and became concerned he might have Lyme's disease. In 1991, Claimant was examined by Julie Pattison, M.D., at the Virginia Mason Clinic in Seattle, regarding possible Lyme's disease. Dr. Pattison noted Claimant's complaints of tingling in both hands, worse in the fourth and fifth fingers bilaterally, and occasional numbness throughout his body. Dr. Pattison observed that Claimant's

neck pain did not seem related to the tingling. In 1996, Dr. Harper referred Claimant to Dr. Boykin for thoracic pain and continuing concerns regarding Lyme's disease. Dr. Boykin noted that Claimant had chronic low back, thoracic, and neck pain. After extensive evaluation, Claimant was never diagnosed with Lyme's disease; rather his symptoms were attributed to a stress disorder. Claimant learned to relax and his condition improved. It appears that Claimant continued his regular work throughout this extensive evaluation period.

6. On July 2, 2002, Claimant was operating a forwarder for Barnett when it lodged between two high stumps. The forwarder slid off the stumps, abruptly dropping two or three feet, and slamming Claimant against the side of the cab cage, severely jarring his neck. Claimant felt sharp neck pain, headache, and aching down into his shoulders and arms. He had not previously experienced such aching in his shoulders and arms. Claimant continued working, but reported his accident to his supervisor that same day.

7. On July 3, 2002, Claimant presented to Dr. Harper who recorded Claimant's complaints of neck pain radiating into his right shoulder and provided chiropractic treatments. Dr. Harper noted Claimant's neck pain at C5 and C7. Claimant continued his regular work. Dr. Harper's notes of July 29, 2002, recorded Claimant's complaints of symptoms radiating into both shoulders. Approximately July 31, 2002, Claimant had to replace a 300 pound hydraulic cylinder on his forwarder at work and aggravated his neck pain. Dr. Harper provided regular chiropractic treatments through October 23, 2002. At that time Dr. Harper recorded that Claimant's neck was 95% improved but that his neck would probably be a problem in the future. Surety paid for Dr. Harper's treatments through October 23, 2002.

8. Claimant never fully recovered but continued to work with intermittent neck pain. At

times he was virtually symptom free; on other occasions he noted significant neck and shoulder pain but worked anyway. Claimant did not seek further treatment from Dr. Harper for over two years.

9. On November 9, 2004, Claimant packed a 175 pound deer across his shoulders for approximately one mile causing back pain and aggravating his ongoing neck pain. On November 15, 2004, Claimant presented to Dr. Harper with mid-back, low-back, and neck complaints. Dr. Harper recorded that Claimant had carried a large deer one mile and experienced increased pain. He provided chiropractic treatments. Dr. Harper was predominately concerned with Claimant's thoracic pain, and also noted his neck pain at C2. Claimant's increased neck pain persisted for approximately a month afterward and then returned to its pre-November 2004 level.

10. Barnett ceased doing business, and in March 2005, Claimant commenced working as a boat fabricator, welding aluminum drift boats. The work required frequent bending, and turning of the head and Claimant's neck pain increased.

11. On March 14, 2005, Claimant returned to Dr. Harper who recorded in his chart note that Claimant's cervical problem stemmed from his industrial injury several years prior. Claimant worked as a boat fabricator for approximately three months before his neck pain became intolerable and he was forced to quit.

12. Claimant returned to Dr. Harper for further treatment. Diagnostic imaging revealed a C5-6 disc protrusion, and C6-7 disc compression impinging on the spinal cord. Dr. Harper referred Claimant to Lewiston neurosurgeon Donald Soloniuk, M.D., for evaluation. On June 13, 2005, Dr. Soloniuk examined Claimant and ultimately recommended surgery. Surety denied Claimant's request for surgical treatment. Dr. Harper then referred Claimant to Coeur d'Alene neurosurgeon Bret Dirks, M.D.

13. On August 31, 2005, Dr. Dirks performed two level cervical fusion. The surgery relieved Claimant's neck and shoulder pain and aching. On November 22, 2005, Claimant requested a release to return to work and Dr. Dirks issued a light duty work release that day. Claimant did not work from the time of his surgery until January 24, 2006. On January 24, 2006, Claimant commenced working as a forwarder operator.

14. Claimant was earning $14 per hour plus overtime and bonuses totaling approximately $200 per day at the time of his 2002 accident. At the time of hearing, Claimant was earning $18 per hour plus overtime and load bonuses totaling approximately $258 per day.

15. Per Dr. Dirks' advice, Claimant now avoids lifting more than 50 to 60 pounds.

16. Having observed Claimant at hearing and carefully reviewed the evidence, the Referee finds that Claimant is a credible witness with a strong work ethic.

DISCUSSION AND FURTHER FINDINGS

17. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

18. **Causation and additional medical treatment.** A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

19. Idaho Code § 72-432(1) provides:

> Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

20. Claimant asserts, and Defendants contest, his entitlement to additional medical treatment for his neck after October 23, 2002, including his entitlement to cervical fusion surgery.

21. Dr. Harper provided Claimant occasional chiropractic treatments for more than 15 years prior to his 2002 accident. Dr. Harper opined that Claimant's need for cervical surgery was caused by his 2002 industrial accident. Defendants assert that Dr. Harper's opinion was based upon an incomplete understanding of Claimant's pre-existing condition. In his deposition, Dr. Harper opined that the C5 disk disruption he noted and treated in 2002 was an ongoing issue that never resolved completely. Dr. Harper testified that Claimant's difficulties at welding boats in 2005 went back to his 2002 industrial injury rather than the aggravation from carrying a deer in 2004. Harper Deposition, p. 112. Dr. Harper opined that Claimant's C5 or C6 disk herniation most likely came from his July 2, 2002, industrial injury. Harper Deposition, p. 116.

22. Dr. Dirks performed Claimant's C5-6 and C6-7 fusion surgery in August 2005. Dr. Dirks' letter of September 12, 2006, attributes the need for surgery to Claimant's 2002 industrial accident. Defendants assert that Dr. Dirks' initial causation opinion was based upon an incomplete understanding of Claimant's neck symptoms prior to 2002. Whatever may have been lacking in Dr. Dirks' understanding of Claimant's medical history was supplied by Defendants during the course of Dr. Dirks' deposition, including, among other things, Claimant's 1989 injury when he was hit on the head by a falling snag, his 1991 report of bilateral hand tingling to Dr. Pattison, the November 2004

deer-carrying incident, and Claimant's history of right-sided cervical complaints versus left-sided disk protrusions. After a thorough review of Claimant's medical history, Dr. Dirks clearly recognized that Claimant had a pre-existing neck condition but opined:

> Yes, he had preexisting condition. I'm pretty convinced of that on a more-probable-than-not basis. I'm also convinced that he had some sort of accident in 2002 while on the job that contributed to more problems for him which required him to go see Dr. Harper and ultimately to the surgery on a more-probable-than-not basis.

Dirks Deposition, Vol. III, p. 85, Ll. 10-17. However, Dr. Dirks acknowledged he did not know what caused Claimant's actual disk injuries. Dirks Deposition, Vol. III, p. 93, Ll. 14-16. Nevertheless, upon concluding his testimony, Dr. Dirks reaffirmed his opinion that Claimant's cervical fusion was related to his 2002 industrial accident:

> Q. Is it your opinion that the surgery that you performed is related on a more-likely-than-not basis to the July 2nd, 2002 accident as an aggravation?
>
> A. Yes.

Dirks Deposition, Vol. III, p. 95, Ll. 15-19.

23. Orthopedic surgeon John McNulty, M.D., performed an independent medical examination of Claimant on January 9, 2007, and thereafter reported that Claimant's 2002 industrial accident resulted in the need for his cervical surgery. Defendants assert Dr. McNulty's initial opinion was based upon an incomplete understanding of Claimant's medical history. Defendants deposed Dr. McNulty post-hearing and after extensively reviewing Claimant's relevant medical history, Dr. McNulty testified:

> Q. (by Defendants' counsel) Would it be fair to say now, Doctor, having reviewed everything we reviewed today, particularly Dr. Harper's actual notes and the actual scenario of events, that you can no longer rely upon the causation opinion you gave in your report?
>
> A. I say there is – I would say the medical record, after reviewing the recent findings by Dr. Harper, does not entirely support that the 7/2/02 injury was the cause of the patient's disk

herniation.

Q. And would it be fair to say you cannot state with a reasonable degree of medical probability, meaning more probable than not, as to what caused the disk herniation, which event or –

A. Correct. I could not say whether or not the 7/2/02 or the deer injury absolutely caused the injury.

McNulty Deposition, p. 68, L. 12 through p. 69, L. 4 (emphasis supplied). Although Defendants' counsel articulated the appropriate standard in his questions, some of Dr. McNulty's responses suggest he may have applied a different standard in formulating his response. It is unclear whether Dr. McNulty applied the standard of reasonable medical probability, or applied an "absolute" standard in evaluating causation.

24. Dr. McNulty's testimony appears ambiguous in that he later agreed that the need for Claimant's cervical surgery was related to the 2002 industrial accident as an aggravation of a pre-existing condition:

Q. (by Claimant's counsel) Dr. Dirks testified today that he believed that the need for the surgery that he performed was related to the industrial accident of 7/2/02 as an aggravation of a preexisting condition. Do you agree with that?

[Objection by Defendant's counsel and response by Claimant's counsel.]

A. As an aggravation of a preexisting condition, the need for surgery?

Q. Right.

A. I'm sorry. The 7/2/02 injury was an aggravation of a preexisting condition?

Q. Correct, that ultimately led to the need for surgery.

[Objection by Defendant's counsel.]

A. I would agree with Dr. Dirks.

McNulty Deposition, p. 72, L. 21 through p. 73, L. 18. However, Dr. McNulty finally testified as

follows:

Q. (by Defendants' counsel) Now, in regards to the aggravation causing the need for surgery, we don't know if it caused the need for surgery because we don't know what herniated the disk, do we?

A. Correct.

McNulty Deposition, p. 83, Ll. 2-6.

25. In addition, portions of Dr. McNulty's testimony suggest he may have believed causation required that Claimant's industrial accident be the sole cause of his ultimate surgery:

Q. (by Defendants' counsel) The other question was: Dr. Dirks testified he couldn't say that was the accident or incident, event that caused the disk injuries that led to the surgery. He just couldn't say that to a reasonable degree of probability.

A. I would say I'd have to – I would say that the medical record as reflected and reviewing it from an outside observer, independent medical evaluation, evaluator, that I would have to agree with what Dr. Dirks has said, that the medical record does not reflect that that's the sole cause.

McNulty Deposition, p. 50, Ll. 15-25 (emphasis supplied). Of course "An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002), citing Wynn v. J. R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

26. Of all the medical providers, Dr. Harper was the most familiar with Claimant's pre-existing cervical condition and the evolution of his cervical symptoms over the years. Dr. Dirks' opinion as Claimant's treating neurosurgeon merits substantial weight. Both related Claimant's cervical surgery to his 2002 industrial accident. Dr. McNulty's opinion is ambiguous and arguably contrary, but seemingly founded upon an inapplicable standard.

27. The Referee finds the opinions of Dr. Harper and Dr. Dirks persuasive. Claimant has

proven that his cervical surgery was related to his 2002 industrial accident.

28. **Temporary total disability.** Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Furthermore:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

29. Claimant underwent cervical surgery on August 31, 2005. At Claimant's request, Dr. Dirks released Claimant to light duty work on November 22, 2005. Claimant returned to work on January 24, 2006, and worked for approximately three weeks. Thereafter Claimant was off work during spring break-up and returned to work full-time approximately May 1, 2006. There is no evidence that appropriate light duty work was offered or available to Claimant between November

22, 2005, and May 1, 2006. Claimant was found medically stable in September 2006.

30. Claimant has proven he is entitled to total temporary disability benefits from August 31, 2005, until approximately May 1, 2006. Defendants are entitled to credit for all amounts Claimant earned during this period.

31. **Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424.

32. Dr. McNulty's January 9, 2007, report rated Claimant's permanent impairment at 25% of the whole person due to his cervical injury and fusion according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides), under a DRE Cervical Category 4. Dr. McNulty opined that Claimant should avoid lifting more than 60 pounds. Based on additional medical history received during his deposition, Dr. McNulty noted that 5% permanent impairment due to loss of cervical range of motion may be attributable to Claimant's pre-2002 cervical spine condition. McNulty Deposition, p. 77, Ll. 6-8. Claimant readily acknowledges his pre-2002 cervical spine problems.

33. When questioned further by Defendants' counsel, Dr. McNulty acknowledged that the Guides prescribe the ROM method, not the DRE method, for rating multiple level disk herniations and fusions in the same spinal area. He noted however, that it would "not make any

sense" if the DRE rating for a single level cervical fusion was 25% whole person, but the ROM rating for a two level cervical fusion was only approximately 10%. McNulty Deposition, p. 66, Ll. 10-11.

34. A closer review of the Guides discloses that a spinal ROM rating is composed of three parts: 1) a diagnosis-based impairment percent due to a specific spine disorder, 2) the total of range of motion impairment estimates, and 3) any neurologic deficit impairment estimates. Guides, pp. 398, 402-403. A complete ROM rating for Claimant herein would include the total of 1) a diagnosis-based impairment of at least 9% whole person, 2) range of motion impairment estimates for flexion and extension, right and left lateral bending, and right and left cervical rotation, and 3) any neurologic deficit impairments. Guides, pp. 404, 417-424.

35. The opinions of physicians are advisory only; the Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

36. The Referee finds that Claimant has proven he suffers a permanent impairment of 20% of the whole person due to his 2002 industrial accident and resulting cervical condition.

37. **Permanent disability**. Claimant alleges his entitlement to permanent disability benefits only if the Commission were to determine his permanent impairment was less than 20% of the whole person. Thus, having found Claimant's permanent impairment due to his industrial accident is 20% of the whole person, Claimant effectively makes no claim for, and the record does not establish, any permanent disability in excess of his permanent impairment.

38. **Idaho Code § 72-406 apportionment.** Claimant having no permanent disability in excess of impairment, the issue of apportionment pursuant to Idaho Code § 72-406 is moot.

39. **Attorney fees.** Claimant demands attorney fees for Defendants' denial of his claim and failure to investigate. Claimant asserts that Defendants' denial is unsupported by any medical evidence. Given the apparent lack of information upon which Dr. Dirks' rendered his initial opinion, Defendants were not unreasonable in challenging Claimant's reliance thereon. Furthermore, as noted previously, Dr. McNulty's deposition testimony is somewhat ambiguous and portions thereof support Defendants' position. The Referee concludes that Claimant has not proven his entitlement to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven his entitlement to additional medical treatment after October 23, 2002, including cervical fusion surgery by Dr. Dirks.

2. Claimant has proven his entitlement to total temporary disability benefits for the period of August 31, 2005, through approximately May 1, 2006. Defendants are entitled to credit for all amounts earned by Claimant during this period.

3. Claimant has proven he suffers permanent partial impairment of 20% of the whole person due to his 2002 industrial accident.

4. Claimant suffers no permanent disability in excess of his permanent impairment.

5. Apportionment pursuant to Idaho Code § 72-406 is moot.

6. Claimant has not proven his entitlement to an award of attorney fees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this _4th__day of December, 2007.

INDUSTRIAL COMMISSION

__/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _24th___ day of __December____, 2007, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

CHRISTOPHER CALDWELL
PO BOX 607
LEWISTON ID 83501

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

ka ___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RORY ROBY, Claimant, v. CHESTER BARNETT, Employer, ASSOCIATED LOGGERS EXCHANGE, Surety, Defendants.	)	**IC 2002-011476** **ORDER** Filed December 24, 2007

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant has proven his entitlement to additional medical treatment after October 23, 2002, including cervical fusion surgery by Dr. Dirks.

2. Claimant has proven his entitlement to total temporary disability benefits for the period of August 31, 2005, through approximately May 1, 2006. Defendants are entitled to credit for all amounts earned by Claimant during this period.

3. Claimant has proven he suffers permanent partial impairment of 20% of the whole person due to his 2002 industrial accident.

4. Claimant suffers no permanent disability in excess of his permanent impairment.

5. Apportionment pursuant to Idaho Code § 72-406 is moot.

6. Claimant has not proven his entitlement to an award of attorney fees.

7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this _24th__ day of __December_____, 2007.

INDUSTRIAL COMMISSION

__/s/_____
James F. Kile, Chairman

__/s/_____
R. D. Maynard, Commissioner

_Dissent Without Comment_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _24th____ day of __December__, 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

CHRISTOPHER CALDWELL
PO BOX 607
LEWISTON ID 83501

ALAN K. HULL
PO BOX 7426
BOISE ID 83707

ka ___/s/_____